Perwira Habib Bank Malaysia Bhd v Wastecol Manufacturing Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C23-2129-86
SITI NORMA YAAKOB J
15 JULY 1988

Banking – Guarantee enforced without debenture rights being resorted to first – Whether guarantor thereby prejudiced and thus discharged from liability – Whether s 94 of the Contracts Act 1950 applicable – Contracts Act 1950, s 94

Civil Procedure – Judgment in default of appearance – Application to set aside – Delay of nine months in filing application – No explanation given – Bona fides of application doubted

Contract – Guarantee – Guarantee enforced without debenture rights being resorted to first – Whether guarantor thereby prejudiced and thus discharged from liability – Whether s 94 of the Contracts Act 1950 applicable – Contracts Act 1950, s 94

The plaintiff obtained a judgment in default of appearance against the third defendant as guarantor of the first defendant's credit facilities given by the plaintiff. In addition to the third defendant's personal guarantee, the plaintiff also held two debentures over the fixed and floating assets of the first defendant. However, the plaintiff did not take any action to appoint a receiver to take over the assets of the first defendant. The third defendant applied to have the judgment set aside, contending that the plaintiff's failure to exercise its rights under the debentures had prejudiced him and under s 94 of the Contracts Act 1950, he is discharged from his liability under the guarantee to the extent of the value of the first defendant's assets.

Held, dismissing the application: (1) Section 94 of the Contracts Act 1950 has no relevance as it refers to cases where a creditor has lost or parted with a security. In this case, the plaintiff has not lost the benefit of the two debentures. They are still in existence and as a guarantor the third defendant's rights to the debentures are still preserved.

(2) The third defendant's objection to the plaintiff not exercising its rights to appoint a receiver cannot provide a line of defence to the third defendant as the plaintiff's conduct is protected by cl 8 of the guarantee which allows the plaintiff to enforce the guarantee notwithstanding that other means of payment have not been resorted to.

(3) Moreover, under s 90 of the Contracts Act 1950, mere forbearance on the part of the plaintiff to enforce the debenture does not discharge the liability of the third defendant under the guarantee.

(4) As no reason was given by the third defendant as to the delay of about nine months in filing the present application, the bona fides of the application is doubted.

Legislation referred to
Contracts Act 1950 ss 90, 94

Simon Hue for the third defendant/applicant.
R Zechariah for the plaintiff/respondent.

Cur Adv Vult

Siti Norma Yaakob J: On 24 March 1987, judgment in default of appearance was entered against the third defendant and about nine months later on 2 November 1987, he applied to have it set aside after his premises were attached on 20 October 1987, pursuant to a writ of seizure and sale.

The only ground relied on by the third defendant in support of his application is that he has merits in his defence which he proposes to file should his application be allowed.

The third defendant is sued as a guarantor pursuant to a guarantee dated 23 August 1984 wherein, in consideration of the plaintiff granting various facilities in the form of an overdraft, a term loan, a bank guarantee and export credit re-financing to the first defendant, the third defendant together with the second defendant guaranteed repayment of all sums due from the first defendant, upon demand by the plaintiff.

In addition to the third defendant's personal guarantee, the plaintiff also holds two debentures dated 19 March 1984 and 23 August 1984 over the fixed and floating assets of the first defendant. The debentures are still subsisting but the plaintiff has, to date, not taken any action on any of them to appoint a receiver to take over the assets of the first defendant, even though it was fully aware that the first defendant had removed its assets to another company called Dencare Products (M) Sdn Bhd. By its failure to exercise its rights under the debentures, the third defendant contends that the plaintiff had prejudiced him and under s 94 of the Contracts Act 1950, he is discharged from his liability under the guarantee to the extent of the value of the first defendant's assets.

The rights and obligations of a guarantor are governed by the terms and stipulations in the guarantee itself and in this case, cl 7 and cl 8 are most relevant.

By cl 7, the liability of the third defendant shall not in any way be affected or prejudiced by the plaintiff holding or taking any other securities or by the plaintiff varying, releasing or omitting to enforce any of such securities. Clause 8 gives further liberties to the plaintiff to resort to any means of payment and may enforce the guarantee, notwithstanding that other means of payment have not been resorted to. The other means of payment must surely refer to the two debentures but the very fact that the plaintiff has not exercised its rights under the debentures does not provide the third defendant with a defence as cl 8 of the guarantee clearly gives the plaintiff complete freedom to choose which of two different securities it wishes to enforce. To that end, s 94 of the Contracts Act 1950 has no relevance as it refers to cases where a creditor has lost or parted with a security. In this case the plaintiff has not lost the benefit of the two debentures. They are still in existence and as a guarantor the third defendant's rights to the debentures are still preserved. However, what is objectionable to the third defendant is that the plaintiff has not exercised its rights to

appoint a receiver to take over the assets of the first defendant. This in itself cannot provide a line of defence to the third defendant as the plaintiff's conduct is protected by cl 8 of the guarantee. Moreover, under s 90 of the Contracts Act 1950, mere forbearance on the part of the plaintiff to enforce the debentures does not discharge the liability of the third defendant under the guarantee.

Another point that was taken up by the plaintiff was the delay of about nine months in filing the present application. No reason was given by the third defendant as to this inordinate delay and since he only decided to file the application when his premises were attached, failure on his part to explain the delay raises much doubts as to the bona fides of this application.

As there were no merits shown in the proposed statement of defence, I had accordingly dismissed the third defendant's application, to have the judgment in default against him set aside, with costs.

Order accordingly.

Solicitors: *Nahappan & Peri*; *Adam & Co.*

Reported by *Ng Sheau Jiuan*

Verghese Mathai v Telok Plantations Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) – COMPANIES WINDING UP NO D2-42-106-88
SITI NORMA YAAKOB J
13 JULY 1988

Companies and Corporations – Misjoinder of parties to petition – Striking off fourth respondent as party in petition – Application for – Objections raised by fourth respondent as to its inclusion as party – Petitioner a majority shareholder of first and fifth respondents and not a member of fourth respondent – Scheme of arrangement to reduce fourth respondent's financial burden accepted by first and fifth respondents – Petitioner's claim that such scheme is oppressive to him – Whether petitioner has locus standi to challenge scheme of fourth respondent – Companies Act 1965, s 181

This is an application by the fourth respondent to have itself struck out as a party to an action presented by the petitioner under ss 181 and 218(1)(f) and (i) of the Companies Act 1965 ('the Act'). The petitioner claimed that a scheme of arrangement formulated by the second and third respondents to enable the fourth respondent (in receivership) to reduce its financial burden and strengthen its financial position was oppressive to him and sought the court's aid to prohibit the fourth respondent from proceeding with the scheme. The petitioner is not a member or shareholder of the fourth respondent. However, he claims connection with the fourth respondent by virtue of the fact that he is a shareholder of the first and fifth respondents who in turn are the secured creditor and shareholder respectively of the fourth respondent. The fourth respondent now contends that the petitioner has no locus standi under s 181 and s 218(1)(f) and (i) of the Act.

Held, allowing the application: (1) The petitioner is questioning the propriety of the scheme as a minority shareholder of the first and fifth respondents when in fact the very same scheme has already been accepted and adopted by the first and fifth respondents and sanction is presently being sought under s 176 of the Act to have such a scheme approved. If indeed the petitioner will suffer loss by reason of the first and fifth respondents adopting the scheme to his detriment, then he should turn to the first and fifth respondents for such loss but as against the fourth respondent, he has no cause of action whatsoever nor can he claim that he had been oppressed under s 181 of the Act by a scheme of arrangement proposed by the fourth respondent when he is not even a member or a shareholder of the fourth respondent.

(2) As the petitioner has no locus standi under s 181 of the Act to challenge the scheme of the fourth respondent, there had been a misjoinder of parties when the fourth respondent was made a party to this petition.

(3) As the petitioner is not seeking to have the fourth respondent wound up but merely seeking relief on the loss he will suffer, reference to s 218(1)(f) and (i) is irrelevant.

Legislation referred to
Companies Act 1965 ss 16(6), 176, 181, 218(1)(f), (i)

G Sri Ram (*Grace Lim* (*Miss*) with him) for the fourth respondent/applicant.
AJ Dason for the petitioner/respondent.

Cur Adv Vult

Siti Norma Yaakob J: The only issue that was raised by the fourth respondent in its application to have itself struck out as a party to this action is that the petitioner has no locus standi to present a petition under ss 181 and 218 (1)(f) and (i) of the Companies Act 1965 ('the Act').

Section 181 deals with the relief available to any member or holder of a debenture of a company, who claims that he has been oppressed either by any act done or any power exercised in a manner prejudicial to his interests in the company or that some act had been done which unfairly discriminates him as a member of the company.

In this case the petitioner claims that a creditors' compromise on a scheme of arrangement formulated by the second and third respondents to enable the fourth respondent now in receivership to reduce its financial burden and strengthen its financial position, is oppressive to him and he seeks the court's aid to prohibit the fourth respondent from proceeding with the scheme.

Relief under s 181 is only available to a member of a company who maintains that he has been oppressed by anything done or power exercised in the company and the first thing that the petitioner has to satisfy is that he is a member of the fourth respondent.

Members of a company have been defined by s 16(6) of the Act to include (1) the subscribers to the memorandum who have been deemed to have agreed to become members of the company and upon the incorporation of